

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35306

STATE OF IDAHO,)	2009 Unpublished Opinion No. 648
)	
Plaintiff-Respondent,)	Filed: October 22, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
EARL WAYNE STEELE,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Darla S. Williamson, District Judge.

Judgment of conviction and unified sentence of twenty-five years, with a minimum period of confinement of seven years, for sexual abuse of a minor under sixteen, affirmed; order denying I.C.R. 35 motion for reduction of sentence, affirmed.

Molly J. Huskey, State Appellate Public Defender; Heather M. Carlson, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

GRATTON, Judge

Earl Wayne Steele entered an *Alford*¹ plea to the charge of sexual abuse of a minor under sixteen. Idaho Code § 18-1506. The district court sentenced Steele to a unified term of twenty-five years, with a minimum period of confinement of seven years. Steele filed an Idaho Criminal Rule 35 motion, which the district court denied. Steele appeals asserting that the district court abused its discretion in sentencing and abused its discretion in failing to reduce his sentence.

¹ See *North Carolina v. Alford*, 400 U.S. 25 (1970).

I.

FACTS AND PROCEDURAL BACKGROUND

Steele was charged by Indictment with three counts of lewd conduct with a minor under the age of sixteen and one count of sexual abuse of a child under the age of sixteen. The Indictment was amended to change only the allegations in Count I from lewd conduct with a minor under the age of sixteen to sexual abuse of a child under the age of sixteen. The acts in amended Count I were alleged to have been committed on or between 2004 and 2005. Pursuant to a plea agreement, Steele entered an *Alford* plea to the amended Count I of the Indictment and the State dismissed the remaining charges and agreed not to file additional charges. During the time period 2004 to 2005, I.C. § 18-1506 provided a maximum sentence of fifteen years imprisonment. The statute was amended in 2006 to increase the maximum sentence to twenty-five years in prison. Steele was advised at the change of plea hearing that, because the acts in amended Count I were alleged to have been committed on or between 2004 and 2005, the version of the statute in effect at that time would control and the maximum sentence was fifteen years. At sentencing, however, the district court followed the State's recommendation and sentenced Steele to twenty-five years imprisonment with seven years determinate. Steele filed a Rule 35 motion, based upon leniency, which was denied.

II.

ANALYSIS

Steele contends that his sentence "exceeds the statutory maximum." However, he specifically states that he "is not raising the argument that his sentence is illegal in this appeal." Instead, Steele argues that the district court abused its discretion in the sentence imposed. When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989). Steele argues that the district court did not act within the boundaries of its discretion because the sentence exceeded the statutory maximum. The State

asserts that Steele failed to preserve for review the claim of an illegal sentence because it was never presented to the district court.²

A claim of an illegal sentence is not an issue that may be presented for the first time on appeal. *State v. Hoffman*, 137 Idaho 897, 903, 55 P.3d 890, 896 (Ct. App. 2002); *State v. Hernandez*, 122 Idaho 227, 229, 832 P.2d 1162, 1164 (Ct. App. 1992). A sentence which exceeds the statutory maximum is an illegal sentence. *Hernandez*, 122 Idaho at 229, 832 P.2d at 1164. Steele asks this Court to hold that the district court acted outside the boundaries of its discretion because the sentence exceeded the statutory maximum. Steele places the cart before the horse. In truth, Steele asks this Court to determine that the sentence exceeded the statutory maximum, i.e., was illegal, and thereupon hold that the district court acted outside the boundaries of its discretion. It is not for this Court to make the initial determination regarding the legality of the sentence. As noted in both *Hoffman* and *Hernandez*, Steele or the State can bring a motion to correct an illegal sentence pursuant to Rule 35 at any time in the district court.

Steele next argues that, given any view of the facts, the district court abused its discretion by imposing an excessively harsh sentence. Sentencing is a matter for the trial court's discretion. Both our standard of review and the factors to be considered in evaluating the reasonableness of the sentence are well established. *See State v. Lopez*, 106 Idaho 447, 449-51, 680 P.2d 869, 871-73 (Ct. App. 1984); *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

In *Hernandez*, Hernandez pled guilty to two counts of sexual abuse of a child under the age of sixteen. As to one count, the maximum punishment was five years. As to the other count, because of an amendment to the statute, the maximum punishment was fifteen years. 122 Idaho at 229, 832 P.2d at 1164. Initially, the district court sentenced Hernandez to concurrent four-year minimum periods of incarceration, followed by indeterminate six-year periods. *Id.* Thereafter, the district court reduced the minimum terms to "zero" and increased the indeterminate terms to ten years. *Id.* The *Hernandez* Court first noted that the sentence as to the first count exceeded the maximum authorized by the statute, but that the issue was not properly raised on appeal. *Id.* The Court then turned to a review of the sentences to determine if they

² As noted, Steele's Rule 35 motion was based solely upon leniency, not for correction of an illegal sentence.

represented an abuse of discretion as excessive. The Court limited its review of the sentence on the first count to the statutory maximum five years. *Id.* at 229-230, 832 P.2d at 1164-1165. Thus, we limit our review of the sentence here to the applicable statutory maximum of fifteen years. Having reviewed the record, we conclude that the district court did not abuse its discretion by imposing an excessive sentence as reviewed under the fifteen-year statutory maximum.

Next, we review whether the district court erred in denying Steele's Rule 35 motion. A motion for reduction of sentence under I.C.R. 35 is essentially a plea for leniency, addressed to the sound discretion of the court. *State v. Knighton*, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006); *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct. App. 1989). In presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). In conducting our review of the grant or denial of a Rule 35 motion, we consider the entire record and apply the same criteria used for determining the reasonableness of the original sentence. *State v. Forde*, 113 Idaho 21, 22, 740 P.2d 63, 64 (Ct. App. 1987); *Lopez*, 106 Idaho at 449-51, 680 P.2d at 871-73. Upon review of the record, we conclude no abuse of discretion has been shown.

III.

CONCLUSION

The claim of an abuse of discretion based upon sentencing in excess of the statutory maximum is, essentially, a claim that the sentence is illegal which was not raised before the district court and which, therefore, we will not consider on appeal. The district court did not abuse its discretion by imposing an excessive sentence as reviewed under the fifteen-year maximum statutory period or by denying Steele's Rule 35 motion. Therefore, Steele's judgment of conviction and sentence as reviewed, and the district court's order denying Steele's Rule 35 motion, are affirmed, noting that the question of illegality may still be presented to the district court under Rule 35 motion.

Judge GUTIERREZ and Judge Pro Tem PERRY, **CONCUR.**